

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 VS.) No: 1:18-CR-98 (SNLJ/ACL)
)
 BARRETT C. SWAN,)
)
 Defendant.)
 _____)

MOTION TO SUPPRESS EVIDENTIARY HEARING
BEFORE THE HONORABLE ABBIE CRITES-LEONI
JANUARY 11, 2019
CAPE GIRARDEAU, MISSOURI

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I N D E X

JANUARY 11, 2019

Plaintiff's Witnesses:	Direct	Cross	Redirect	The Court
JONATHAN KEMP	5	16	28	27
BRIAN EGGERS	30			41

1 (PROCEEDINGS BEGAN AT 10:10 AM.)

2 THE COURT: This is the *United States of America*
3 *versus Barrett C. Swan*. It's Case No. 1:18-98(SNLJ).

4 And so I guess as -- Can I speak with the Deputy
5 Marshal for just a moment?

6 (Pause)

7 THE COURT: I just want to make you a little more
8 comfortable during the proceeding, Mr. Swan.

9 THE DEFENDANT: Thank you.

10 THE COURT: As a matter of routine, the Marshals will
11 keep some of that stuff on you when things are quick, but I
12 expect we're going to be in here for an hour or so, and I'd
13 much rather have you be a little bit more comfortable rather
14 than save time as you're going back through the facility, so.

15 THE DEFENDANT: Thank you.

16 THE COURT: You're welcome.

17 In any event, when we were here in court last, there
18 was a discussion about the fact you were considering engaging
19 the services of a different attorney. And so I set a
20 deadline. Isn't that right?

21 MS. BOOTH: It is accurate, Your Honor.

22 THE COURT: Okay. I thought -- All of a sudden I
23 thought: Well, maybe I remembered this wrong. But I think
24 the deadline was January 4th for an attorney to enter. And I
25 did have a phone conference with the attorneys last week, just

1 to get a status on things.

2 But for the record, I wanted to make sure to hear
3 from you the status on that and if you did ultimately change
4 your mind and decide that you're happy to proceed with
5 Ms. Booth representing you in this matter.

6 THE DEFENDANT: Yes, ma'am. I'm confident with
7 Mrs. Booth.

8 THE COURT: Okay, very good. So with that out of the
9 way, the purpose of the proceeding today is to address two
10 motions that have been filed on your behalf, Mr. Swan. One is
11 a Motion To Suppress Evidence. That's Document 35. The
12 Government has filed a response. That's Document 39. And
13 then there's also a Motion to Sever Counts, Document 46, and
14 the Government filed a response, Document 47. So as I
15 understand it, the Motion to Sever is simply being submitted
16 on the pleadings because it's solely a legal issue. There's
17 no need for evidence to be presented. Is that right?

18 MS. BOOTH: That's correct.

19 THE COURT: Okay. And so I will be considering your
20 Motion to Sever, Mr. Swan. But as I do understand it, with
21 regard to the Motion To Suppress Evidence, there is a need for
22 witness testimony to be offered. And so there are witnesses
23 here in the courtroom. And would you all like to make any
24 record before we begin?

25 MR. SORRELL: Your Honor, just that the Government

1 invokes the rule on witnesses.

2 THE COURT: Okay.

3 MR. SORRELL: We only have one witness, Mr. Kemp.

4 THE COURT: Okay. And so with the rule on witnesses
5 being invoked, if there are other witnesses expected or
6 anticipated, those individuals should excuse themselves from
7 the courtroom, and you'll be called when you are needed.

8 All right, very good.

9 And so, Mr. Sorrell, you may proceed.

10 MR. SORRELL: Thank you. I call Jonathan Kemp,
11 please.

12 (The Witness, JONATHAN KEMP, Is Sworn.)

13 THE COURT: And please feel free to adjust the
14 microphone however it's comfortable for you. We want to make
15 sure that everybody can hear you clearly when you answer any
16 of the questions from the lawyers.

17 All right.

18 MR. SORRELL: Thank you.

19 DIRECT EXAMINATION QUESTIONS BY MR. SORRELL:

20 Q Would you state your name, please?

21 A Jonathan Kemp.

22 Q And would you spell ---

23 THE COURT: And why don't you just go ahead and pull
24 it a little closer to you.

25 THE WITNESS: Closer?

1 THE COURT: Yes. I know; it's ---

2 MR. SORRELL: There you go.

3 THE COURT: Don't be bashful. That's all I'll say.

4 Just speak right into that microphone.

5 THE WITNESS: All right.

6 Q (By Mr. Sorrell) And would you spell your last name for
7 the record?

8 A Kemp, K-E-M-P.

9 Q What agency do you work for?

10 A City of Florissant.

11 Q In a police department?

12 A Yes, sir.

13 Q Okay. How long have you worked in that department?

14 A Approximately four-and-a-half years.

15 Q And what is your rank or your position with Florissant
16 Police Department?

17 A Patrol officer.

18 Q Now on August 1st, 2018, at around 3:20 AM, did you
19 happen -- were you working as a police officer?

20 A Yes, sir.

21 Q And if I can clear something up at the very beginning, I
22 believe the first sentence on your report says that the event
23 happened on August 8th. Is that right?

24 A Correct.

25 Q But we're all -- The truth of the matter, it was on

1 August 1st.

2 A Correct.

3 Q Okay. Now on that date at around 3:20 AM when you were
4 working, were you patrolling in your patrol car?

5 A Yes, sir.

6 Q Did you see -- have an occasion to see a red Ford Edge?

7 A Yes, sir.

8 Q And what caused you to notice that red Ford Edge?

9 A I observed the vehicle violate a stop sign.

10 Q And do you know what street address that was that the
11 violation occurred?

12 A It was on the -- The stop sign's on Dunn Road just west
13 of St. Michael Court.

14 Q Okay. And then what did you do after seeing the Ford
15 Edge fail to stop at the stop sign?

16 A Positioned my patrol vehicle behind the vehicle and
17 activated my emergency equipment.

18 Q Did the Ford Edge stop soon after you activated your
19 emergency lights?

20 A Yes, sir.

21 Q And what did you do at that point?

22 A Exited my patrol vehicle, walked up to the vehicle, made
23 contact with the occupants and spoke to the driver.

24 Q And who was the driver?

25 A Tiara Thorpe.

1 Q And that's T-H-O-R-P-E? Is that right?

2 A Yes, sir.

3 Q Okay. Did you get any personal information from

4 Ms. Thorpe?

5 A Yes, sir. She provided me with a driver's license.

6 Q Okay. And was there a passenger in the car?

7 A Yes, sir.

8 Q Where was that passenger seated?

9 A The front right seat.

10 Q Was there anyone else in the car besides the passenger
11 and the driver?

12 A No, sir.

13 Q Was the passenger a male or a female?

14 A A male.

15 Q And did you ask that man for his identification?

16 A Yes, sir.

17 Q How did that man respond?

18 A Stated that he did not have a driver's license on his
19 person or identification but provided me with a pedigree
20 orally.

21 Q Okay. And when you say a "pedigree," what are you
22 referring to in terms of what did he provide?

23 A First/last name, date of birth and Social Security
24 Number.

25 Q Okay. Now are you able to check those items through a

1 department-issued computer that's in your patrol car?

2 A Yes, sir.

3 Q That is, you don't have to call back to a dispatcher and
4 relay that information by radio.

5 A Correct.

6 Q Okay. And did you run that information that the
7 passenger, the male passenger, gave you through your patrol
8 car computer?

9 A Yes, sir.

10 Q And did you also run Ms. Thorpe's information?

11 A Yes, sir.

12 Q And what did you learn about Ms. Thorpe from your
13 computer?

14 A That her license was valid and did not have any arrest
15 warrants.

16 Q Okay. And did the -- What did the computer tell you
17 about your male passenger's information?

18 A The pedigree information did not match up with the person
19 depicted in the Department of Revenue picture.

20 Q Okay. And do you remember whether it was a difference of
21 male or female or age or race or ---

22 A I believe it was a female is what the Social Security
23 Number came back to, was a female subject.

24 Q Okay. And what did you do at that point?

25 A Made contact again with the passenger of the vehicle.

1 Q And did you have a conversation with the passenger?

2 A Yes, sir.

3 Q And could you tell the Court what happened in that
4 conversation?

5 A During the conversation, I spoke to him; advised him that
6 the information he provided was inconsistent with his
7 appearance and his person; gave him the opportunity to provide
8 me other pedigree information which he did.

9 Q Okay. Did you explain to the man what would happen in
10 the event that he was unable to provide correct information?

11 A That we'd most likely have to go back to the Police
12 Department and get fingerprinted to be able to identify the
13 subject.

14 Q Okay. And did you say anything to the man about, "You
15 might as well make it easier on yourself"?

16 A Yes, sir.

17 Q Okay. How did the man respond to your inquiries at that
18 point?

19 A He provided me with a different name and Social Security
20 Number.

21 Q And what did he tell you his name was?

22 A Barrett Swan.

23 Q And did this person give you another Social Security
24 Number?

25 A Yes, sir.

1 Q Okay. And what did you do with that information?

2 A I responded back to my patrol car and did a computer
3 inquiry of that information.

4 Q Okay. What did -- report did you get from your computer
5 about the Mr. Barrett Swan?

6 A That he had an active federal arrest warrant.

7 Q Okay. And what did you do at that point?

8 A I responded back up to the vehicle, made contact with
9 Mr. Swan again; requested that he exit the vehicle; advised
10 him that he was under arrest for his active warrant.

11 Q Okay. Did Mr. Swan actually step out of the car at your
12 request?

13 A Yes, sir.

14 Q And did you see anything that caught your attention when
15 Mr. Swan stood up?

16 A Yes, sir.

17 Q What was that?

18 A While he was exiting the vehicle, there was a firearm on
19 the passenger seat where he was previously sitting.

20 Q And when you say a "firearm," are you talking about a
21 handgun?

22 A Yes, sir.

23 Q And what did you do upon seeing the handgun?

24 A Swan was handcuffed, and then I had secured the firearm
25 and -- Like at the same time, for safety, I asked Ms. Thorpe

1 to step out of the vehicle as well.

2 Q Okay. And did you take Mr. Swan to your Police
3 Department?

4 A Yes, sir.

5 Q And where would that have been?

6 A The City of Florissant.

7 Q Okay. Now was there also some conversation between you
8 and Mr. Swan at the scene about him saying "good-bye" to
9 Ms. Thorpe?

10 A Yes, sir.

11 Q And can you relate to the Court what that was?

12 A He had asked if he could say "good-bye" to Ms. Thorpe,
13 and I allowed her to walk back to the patrol vehicle where
14 they had a brief conversation, and he stated something to the
15 effect of "I'm done" or "I'm finished" while speaking with
16 her.

17 Q Okay. And this was in your presence?

18 A Correct, sir.

19 Q All right. And then did Ms. Swan (sic) get in her -- get
20 in her car and leave?

21 A Yes, sir.

22 Q Did you issue tickets to her for the traffic offenses?

23 A Yes, sir.

24 Q And I believe there were three issued that morning. Is
25 that right?

1 A Yes, sir.

2 Q A stop sign violation, an insurance violation and some --
3 another traffic violation. Is that ---

4 A Failure to register motor vehicle, sir.

5 Q Is that dealing with the license plate?

6 A Correct; the registration on the vehicle. It had a
7 dealer plate on it, but when I did an inquiry of the VIN, it
8 had an expired temp tag registered to the vehicle.

9 Q All right. But she wasn't detained at the -- at the --
10 after you finished with her business. Is that fair?

11 A No, sir.

12 Q Okay. Now -- So you took Mr. Swan back to the Florissant
13 Police Department?

14 A Yes, sir.

15 Q And what was done with Mr. Swan at that location?

16 A He was escorted into the holdover where I inventoried his
17 property; provided him a jumpsuit that he would change into,
18 and he was properly booked.

19 Q Now what -- what is a hold -- the "holdover" that you
20 call it? Can you describe what purpose it serves?

21 A So we have a holdover where we hold persons before they
22 get either transferred to a county or to a different police
23 department for arrest warrants.

24 Q It's basically just a temporary place for detainees to
25 stay?

1 A Correct.

2 Q Okay. And did you complete your paperwork on the traffic
3 stop and the arrest?

4 A Yes, sir.

5 Q Now did you speak again with Mr. Swan?

6 A I spoke to him while inventorying his property and
7 providing him that change of clothes, yes, sir.

8 Q And when you say "inventorying his property," do you mean
9 personal effects in his pockets and things like that?

10 A Yes, sir.

11 Q Okay. And what was the subject of that conversation?
12 Can you tell the Court what was said back and forth?

13 A I told him that upon completion of the booking process,
14 that he would be escorted to an Interview Room and given the
15 opportunity to talk about the firearm.

16 Q And how did Mr. Swan respond?

17 A He stated to the effect of, "I'm not going to talk; we
18 both know what you found in the car, and I'd rather be in the
19 situation I'm in now than the situation that I was in in the
20 past when I was shot and didn't have anything on me."

21 Q Okay. And those words are the substance of what Mr. Swan
22 said. Is that fair?

23 A Yes, sir.

24 Q It's not an actual quotation.

25 A That's correct, sir.

1 Q Okay. I don't want to mislead the Court as to what --
2 what you recall about that.

3 A Yes, sir.

4 Q Now prior to Mr. Swan making the statement, did you ask
5 any question of Mr. Swan -- of Mr. Swan that would require
6 that answer?

7 A No, sir.

8 Q Did he -- Did he make that statement all as one
9 statement?

10 A Yes, sir.

11 Q Okay. That is, there wasn't an intervening question on
12 your part.

13 A No, sir.

14 Q Did you continue to speak with Mr. Swan?

15 A No. He indicated that he did not want to speak.

16 Q So basically that was the end of your contact with him?

17 A Correct, sir.

18 Q And did you put your -- that statement of Mr. Swan's oral
19 statement in your report?

20 A I did not, sir.

21 Q And any reason why you didn't?

22 A I didn't -- At the time I didn't, I guess, fully
23 understand the relevance that it would ultimately play.

24 Q All right.

25 A So it was not entered into the report.

1 MR. SORRELL: Nothing further. Thank you.

2 THE COURT: Okay. Cross Examination?

3 MS. BOOTH: Thank you.

4 CROSS EXAMINATION QUESTIONS BY MS. BOOTH:

5 Q Officer Kemp, good morning.

6 A Good morning.

7 Q When you removed Mr. Swan from the car, he was officially
8 in custody; correct?

9 A He was not in hand -- I mean upon exiting the vehicle, he
10 was placed into handcuffs and advised he was under arrest,
11 correct.

12 Q Okay. So then he was no longer free to walk away.

13 A Correct.

14 Q Okay. And at that point, *Miranda* rights weren't read to
15 him.

16 A Correct.

17 Q And *Miranda* rights were never read to Mr. Swan, correct?

18 A Correct.

19 Q Officer Kemp, as to the statement that you say Mr. Swan
20 made at the Florissant Police Department, Mr. Sorrell just
21 asked you; that statement that you've relayed to us isn't a
22 verbatim statement, correct? It's just what you remember the
23 gist of what the statement was?

24 A The first part is what I one hundred percent recall. As
25 far as towards like the very end when it was referenced to

1 being the situation "now that I was -- when I was in
2 previously and didn't have anything on me," that part I do not
3 recall specifically. I know it was to that effect, but in
4 reference to "We both know what you found inside of the
5 vehicle" was his statement, yes, ma'am.

6 Q Okay. So "We both know what you found inside of the
7 vehicle" was Mr. Swan's verbatim statement to you.

8 A I believe so.

9 Q Okay. And you're confident about that.

10 A Pretty confident, yes, ma'am.

11 Q Okay. But then as truth be told, the second part you
12 can't tell us verbatim the words but simply just the gist.

13 A Correct.

14 Q Okay. And it's fair to say that these statements that
15 Mr. Swan made weren't memorialized by an audio recording or
16 anything like that.

17 A Correct.

18 Q And when he made these statements, you didn't write them
19 down immediately, correct?

20 A Correct.

21 Q So we are just going on your memory.

22 A Correct.

23 Q It's fair to say that your memory could be a little
24 flawed about the second part of that statement as far as the
25 order of words and which words were used?

1 A Possibly. Like I said, I believe that that was the
2 statement, but not verbatim, yes, ma'am.

3 Q Okay. So it's possible you could be a little mistaken.

4 A Correct.

5 Q And truth be told with the police report, you've already
6 admitted there is one mistake that happened in your memory
7 when making the police report; correct?

8 A Yes, ma'am.

9 Q The date -- The date of the actual incident?

10 A Yes, ma'am.

11 Q And, Officer Kemp, what was the date when you actually
12 made your police report in relation to arresting Mr. Swan on
13 August 1st?

14 A I would have started the police report that same -- at
15 that same time or during that shift.

16 Q Okay. Would you happen to know the reason why you got
17 the date wrong?

18 A No, I'm not sure to be honest.

19 Q And when was it that you caught your mistake?

20 A I think it was initially whenever I had received
21 something about the case and it -- and it -- getting set for
22 this occasion. And while reviewing the case, I noticed that
23 there was a discrepancy between the General Info page that had
24 the correct date on it. And then while reviewing my report, I
25 had reviewed all the documents and noticed a discrepancy

1 between the two at that time. I don't know the exact date of
2 when that was, though.

3 Q Okay. Did you take any effort to make a correction or
4 file a supplemental report?

5 A No, ma'am.

6 Q And, Officer Kemp, after it came to light that this
7 statement was made by Mr. Swan, you realized that you had not
8 included that in your police report. Is that correct?

9 A Correct.

10 Q At that point did anyone ask you to create a supplement
11 report to explain and memorialize when this statement happened
12 and the subject matter, that type of thing?

13 A I believe whenever I was contacted by the agent and I
14 advised him of that statement, he stated that it was going to
15 be added to his report and that -- that it would be in that
16 report and nothing further in mine.

17 Q And tell me again where in the Police Station this
18 statement was made by Mr. Swan.

19 A So whenever you go into our holdover, there's an area
20 that has a couple of temporary holding cells and the booking
21 counter as well as an area that has lockers and the jumpsuits
22 that we change them into. It was in that room where the
23 lockers and the jumpsuits are.

24 Q Okay. And Mr. Swan made his statement in response to you
25 saying, "We're finished with booking, and I'd like to take you

1 upstairs for an interview." Can you tell me again what you
2 said prior to Mr. Swan making his statement?

3 A So we were in the area where the lockers are and the
4 jumpsuits and was retrieving his items to start inventorying
5 his property, so the booking process was not complete yet. He
6 still had to get changed into a jumpsuit and get booked into
7 the computer. But I advised him -- Just like I typically do
8 with anybody if there's going to be an interview to take
9 place, I advise them that upon the completion of the booking
10 process, that they'll be escorted to the Interview Room to
11 speak further about the case involved.

12 Q Okay. And that's what you said to Mr. Swan.

13 A Correct.

14 Q Okay. And then he responded with what you said he said.

15 A Correct.

16 Q Okay. So this wasn't a situation where you were just at
17 the desk filling out some paperwork and Mr. Swan just
18 spontaneously said out of nowhere, "We both know what you
19 found in the car; I'm not going to talk," and whatever it is
20 that you've attributed to him as saying. It wasn't simply
21 just a spontaneous statement, correct?

22 A It was just -- It was in reference to my statement to
23 him, correct.

24 Q Okay. Officer Kemp, too, I'd like to talk about a few
25 other things that are important that may not be in your police

1 report so that we know if anything has been left out that's
2 critical. The passenger, Tiara Thorpe, at the scene told you
3 that that firearm was hers, correct?

4 A She said, yes, that the firearm was hers.

5 Q Okay. And we don't see that anywhere in your police
6 report. Is that correct?

7 A Correct.

8 Q Is there a reason why you left out that information from
9 your police report?

10 A No direct reason. I advised her if she had the paperwork
11 and wanted to bring it up, that I would attach it to the
12 police report, but I never received no paperwork for the
13 firearm.

14 Q And, again, when you got the information from Mr. Swan
15 that he had essentially given you the false identifying
16 information and you figured that out, when you came back to
17 the car to talk to him about that, did you remove him from the
18 car or was he simply sitting in the car and you're speaking to
19 him through the window about, "Please give me your real
20 identity or we're going to have to go get fingerprints"?

21 A I initially was still talking to him at the vehicle.

22 Q Okay. So the only time he was removed from the vehicle
23 is when you came back the second time and realized he was
24 Barrett Swan because he had given you the real name --

25 A Correct.

1 Q -- and then removed him?

2 A Correct.

3 Q Okay. And then when removing Mr. Swan from the car, of
4 course, you're always looking for firearms or weapons. You're
5 trained to do that, correct?

6 A Correct.

7 Q Obviously for safety reasons.

8 A Correct.

9 Q Your safety and everyone's safety. And initially you saw
10 the butt end of the gun by the seat belt area?

11 A Correct.

12 Q And it took you a second to realize that the gun wasn't
13 part of the seat belt, correct?

14 A Correct.

15 Q So -- But once you took a good look at it, you realized
16 the firearm.

17 A Correct.

18 Q Okay. And so it was dark inside the car.

19 A Other than the lighting, correct.

20 Q Okay. So even with the dome light on, you at first
21 thought that it was part of the seat belt.

22 A Yeah. With the way that he was exiting the vehicle and
23 the door ajar, you know, it's hard to kind of get in between
24 there and get a full view of the seat until he's fully exited,
25 if that -- if that kind of makes sense.

1 Q Sure. And so just so I understand, the gun was located
2 up against the left seat belt holder on the base of the seat.
3 Am I understanding that correctly?

4 A More so up on top of the seat, but it was just -- Like I
5 said, I didn't know at first if it was like the seat belt
6 holder, if you will. It was kind of like laying over, sitting
7 onto the seat. Different vehicles have different parts of
8 that, so some of them just kind of hang there. Some of them
9 are more upright. So it's hard to tell at first. And then
10 once he was fully outside of the vehicle, then I could observe
11 it.

12 Q Okay. But this wasn't a situation where he stepped out
13 of the vehicle and the firearm was just square in the middle
14 of the seat such that Mr. Swan was actually sitting squarely
15 on the firearm.

16 A Correct.

17 Q Okay. Is it fair to say one of the reasons why you
18 didn't include these statements Mr. Swan made to you at the
19 Police Station in your police report is because the statements
20 didn't register in your mind that Mr. Swan was admitting
21 possession of the firearm?

22 A Prior to me getting off that shift, I had spoke to the
23 agent in reference to the case and advised him of it, and he
24 had said that he was putting it in his report, and I hadn't
25 added it to my report or anything of the sort yet. So he said

1 that he was going to add it into his. I didn't see
2 necessarily a relevance to also add it into mine which I
3 should have. I didn't, you know. But it wasn't -- I wouldn't
4 say it was in relation to that.

5 Q And then as far as you alerting Agent Eggers that
6 Mr. Swan had been arrested, you alerted him on August the 1st?
7 Would that be ---

8 A I believe so, yes. It would have been the same day as
9 the arrest.

10 Q Okay, the same day. Okay. Did you make mention to
11 Agent Eggers that Tiara Thorpe had said the gun belonged to
12 her?

13 A I do not recall specifically.

14 Q Is there -- Would there be a reason why you wouldn't tell
15 the agent that?

16 A No, no specific reason.

17 Q And, again, so we can make sure we have everything in
18 your report accurate, there's nothing in your report that
19 indicates you sent the gun to the crime lab to be
20 fingerprinted, correct?

21 A Correct.

22 Q But you did send the gun to be analyzed for fingerprints?

23 A Typically whenever -- Yes; yes. Through our -- our
24 evidence room, they typically fingerprint any firearms that
25 come through.

1 Q Okay. And what did you learn about your request as to
2 whether or not there were any fingerprints on the firearm?

3 A There were no fingerprints located. Typically if they
4 locate any fingerprints, then they will document that. When I
5 spoke to our Evidence Technician, there was no actual report
6 that was done indicating that there were no fingerprints
7 located on the firearm.

8 Q And Mr. Swan's demeanor with you, Officer Kemp, he was
9 not combative or argumentative --

10 A No.

11 Q -- or rude or anything like that.

12 A No.

13 Q Okay. And as to the evidence that he possessed, the
14 firearm, it's his proximity to it in the car?

15 A Correct; the constructive possession of the firearm.

16 Q You didn't recognize him make any furtive movements
17 toward the firearm or anything like that?

18 A No, not -- not when I saw the vehicle, no, ma'am.

19 MS. BOOTH: Just a moment, Your Honor. I'd like to
20 touch base with Mr. Swan.

21 THE COURT: Certainly.

22 (Pause)

23 Q (By Ms. Booth) Officer Kemp, we do have the Event Report
24 from Dispatch showing the times that you reported to the scene
25 and cleared the scene, correct?

1 A Correct.

2 Q So are you able to tell me, from the time you stopped the
3 car, how long Mr. Swan was in the car with the firearm before
4 you discovered it and retrieved it?

5 A I believe on that report, from the time that his -- that
6 I stopped the vehicle until the time that his name was added
7 to the call, which would have been after I had located him
8 inside the computer as well as ran him over Dispatch, I
9 believe that timeframe is between ten to fifteen minutes.

10 Q And, again, I just want to make certain I understand the
11 location of the firearm. Again, it wasn't, obviously, square
12 in the middle of the right front passenger seat, correct?

13 A Correct.

14 Q Okay. So it was toward the left edge of the front right
15 passenger seat back by the seat belt holster. Is that fair to
16 say?

17 A Correct.

18 Q And it was more up on the edge of the seat?

19 A Yeah, just kind of the edge of the seat towards the
20 center console, seat belt holder; that area right there.

21 Q Okay.

22 MS. BOOTH: All right, Officer Kemp. Thank you.

23 THE WITNESS: Thank you.

24 THE COURT: Any Redirect, Mr. Sorrell?

25 MR. SORRELL: No, Your Honor.

1 THE COURT: Okay. I have just a few brief questions
2 for you, Officer Kemp.

3 THE WITNESS: Sure.

4 EXAMINATION BY THE COURT:

5 Q And you may have answered this and I just missed it. But
6 you said that there were three tickets issued to Ms. Thorpe.
7 One of them was failure to register. What were the other two?

8 A Violated a stop sign and no insurance.

9 Q Stop sign and no insurance, okay. And then as far as the
10 time of your shift that night, what -- when did it start and
11 when did it end?

12 A My shift, we go -- We do 12-hour shifts. So 6:00 PM to
13 6:00 AM.

14 Q Okay. So Officer Eggers arrived before 6:00 AM?

15 A He had contacted me via phone.

16 Q Oh, it was a phone communication.

17 A Yes, ma'am.

18 Q Okay. And then back to how this firearm was located when
19 you observed it in the right front passenger seat. I
20 understand it was somehow leaning against the seat belt
21 holster. Was the barrel of the gun pointing toward the
22 passenger door or how was the barrel of the gun, if you
23 remember?

24 A I believe that that would be correct, where the butt end
25 would be facing toward the front side of the vehicle and the

1 barrel was along the back side of the seat, if that makes
2 sense.

3 Q Oh, okay. Okay. So it was actually pointing forward.

4 A Pointing -- Well, the barrel towards like the passenger
5 side door; the stock, the bottom butt of the gun facing
6 towards the front.

7 Q Okay. Okay. So it was leaned on its side.

8 A Correct, yeah, laying down on its side.

9 Q Like laying down, all right. Very good.

10 THE COURT: Any further questions from either ---

11 MR. SORRELL: May I?

12 THE COURT: Yes, you may.

13 MR. SORRELL: I'm sorry.

14 REDIRECT EXAMINATION QUESTIONS BY MR. SORRELL:

15 Q Officer, where were you standing when you first observed
16 the -- the handgun?

17 A When I first observed it? So he was actually in the
18 vehicle, and I -- You know, the door was open. So I was kind
19 of on the far side of the door with him exiting out. So it
20 took me a second to fully be able to see that passenger seat.

21 Q So is it fair to say that the door was between you and
22 Mr. Swan, --

23 A Correct.

24 Q -- the open car door?

25 Okay. So you weren't inside the car when you first

1 observed the pistol.

2 A Correct.

3 Q Okay. And when you saw the butt end of it, how long did
4 it take you to realize what that was?

5 A It wasn't but -- Because it was maybe a second away from
6 him, you know, taking one more step and fully exiting the
7 vehicle to see the rest of it.

8 Q And did you realize that the item was a firearm before
9 you entered the vehicle?

10 A Yes, sir.

11 MR. SORRELL: Okay. Nothing further.

12 THE COURT: All right. Ms. Booth?

13 MS. BOOTH: I have nothing further.

14 THE COURT: Okay. Thank you, Officer Kemp. You're
15 excused.

16 THE WITNESS: Thank you.

17 MR. SORRELL: No further evidence, Your Honor.

18 THE COURT: Oh, that's right.

19 And so the Government rests.

20 And, Ms. Booth, I understand you have evidence.

21 MS. BOOTH: I do, Your Honor. I'd like to call
22 Brian Eggers, Agent Eggers. He's in the hall.

23 THE COURT: Okay. And it sounds like Officer Kemp
24 may request that he report.

25 Would you mind, Officer Kemp? Thank you.

1 (The Witness, BRIAN EGGERS, Is Sworn.)

2 THE COURT: All right. You may proceed.

3 MS. BOOTH: Thank you.

4 DIRECT EXAMINATION QUESTIONS BY MS. BOOTH:

5 Q Sir, please state your name for the record.

6 A Brian Eggers.

7 Q And, Agent Eggers, you are employed with the ATF,
8 correct?

9 A Yes. Well, I'm employed by the City of Cape Girardeau as
10 a police officer and I'm a Task Force Officer for the ATF,
11 yes.

12 Q All right. And you had occasion, Agent Eggers, to speak
13 with Officer John Kemp from the Florissant Police Department
14 back in August of this year about the arrest of Barrett Swan,
15 correct?

16 A Yes, ma'am.

17 Q Okay. So the way that unfolded is Officer Kemp called
18 you after Barrett Swan was arrested on the ATF warrant for his
19 arrest for felon in possession of a firearm. Is that
20 accurate?

21 A Yes, ma'am.

22 Q Do you know the day that Officer Kemp contacted you?

23 A I would have to check.

24 Q Please.

25 A I believe it was August 8th.

1 Q And that date -- We've heard from Officer Kemp that
2 actually he was mistaken in his police report; that it wasn't
3 August the 8th that Mr. Swan was arrested. It was actually
4 August the 1st. So the fact that your police report reflects
5 August 8th, were you looking at his police report when you
6 were drafting your investigation report?

7 My question is: If you could explain to me how that
8 date error also made its way into your report, if you know,
9 sir.

10 A Yeah. I guess I was under the impression that he was
11 picked up that night when -- when Officer Kemp called me and
12 said that he was arrested.

13 Q Okay. So it's your impression that Officer Kemp called
14 you immediately upon arresting Barrett Swan.

15 A That's correct.

16 Q Okay. And ---

17 A That's also when I was notified that the warrant was
18 (inaudible) as well. We get -- We get notified from our JSOC,
19 ATF, that the warrant has been cleared.

20 Q All right. And then -- So Officer Kemp called you. You
21 didn't call him; correct?

22 A Correct.

23 Q Now the contents of your conversation with him at that
24 time, was that like in the early morning hours, like 4:00 in
25 the morning? 5:00 in the morning? Something like that?

1 A Yes, ma'am.

2 Q Okay. So, Agent Eggers, how did you memorialize what
3 Officer Kemp was telling you? What's your practice? Do you
4 have a little recorder? Do you write down notes? How do you
5 keep track of what information Officer Kemp was giving you
6 over the phone?

7 A Listen to him.

8 Q Okay. So just -- You didn't -- You didn't take any
9 notes. It was simply memory.

10 A No. If I took any notes, it would have probably just
11 been probably stating his number to follow up, you know, once
12 I got to work the next morning.

13 Q Okay. So my next question was: As far as when you made
14 your investigation summary of the event, the written form,
15 when was that? Do you remember what day?

16 A When did I write my report based off of what ---

17 Q Yes.

18 A The report was finalized on August 27th.

19 Q So you wrote your report on August the 27th?

20 A Yes, ma'am.

21 Q Okay. And in making your report, there was no notes you
22 referred to; you simply went from memory?

23 A No, ma'am. I believe I waited until I -- I got the
24 reports from Florissant Police Department.

25 Q Okay. So you used those reports in making sure that your

1 report was accurate.

2 A Correct.

3 Q Okay. And so you are aware, Agent Eggers, that there is
4 a fact in your report that we don't find in Officer Kemp's
5 report, and that is the fact of statements that Mr. Swan made
6 to Officer Kemp, correct?

7 A Correct.

8 Q Was there ever a time when you received Officer Kemp's
9 report that you noticed that discrepancy and it caught your
10 attention?

11 A No, ma'am. That was -- That was a phone call that --
12 between Officer Kemp and myself when he told me that, what
13 Mr. Swan said.

14 Q Okay. And that phone call when Officer Kemp told you
15 that, that was when he called you in the early morning hours
16 of August the 1st, correct?

17 A I don't remember if it was that phone call or subsequent
18 phone calls.

19 Q Oh, okay. All right.

20 A It may have been the next day when I talked to him. I
21 don't remember if it was that -- that phone call that morning
22 because from what I recall from that morning, I think it was a
23 fairly brief phone call because it was 3:00 or 4:00 in the
24 morning.

25 Q Sure. Okay. I'm sorry, sir. I didn't know that there

1 were subsequent phone calls. So thank you for bringing that
2 to my attention.

3 So there was the first phone call on August the 1st
4 to say, "We have him and you're looking for him," obviously.

5 A Yes, ma'am.

6 Q Okay. So -- And then after that, there were subsequent
7 phone calls, correct?

8 A Yes, ma'am.

9 Q Do you know how many?

10 A Not very many; typical phone calls of, you know, police
11 reports and who can I contact to get this report; just all
12 normal administrative.

13 Q Okay. That makes sense. And so you can't remember in
14 which one of those conversations it came up that Mr. Swan had
15 made a specific statement?

16 A I don't remember which phone call.

17 Q At some point, though, did you ever realize that that
18 statement was never included in Officer Kemp's police report?

19 A Yes, ma'am, I did.

20 Q And at what point was that?

21 A I don't remember exactly when, but I did have a
22 conversation with Officer Kemp about -- about that.

23 Q Okay. And so when you saw the discrepancy and you were
24 prompted to circle back and talk to Officer Kemp about it,
25 obviously, you're being thorough, so you want all the facts to

1 be accurate. But were you concerned in any way that -- that
2 his report wasn't accurate or that perhaps his memory wasn't
3 accurate of the event?

4 A No, ma'am.

5 Q And what did he say to you as far as why that statement
6 wasn't included in his report?

7 A I believe we had a conversation about him adding that to
8 the report, and I didn't ask him why it wasn't included.

9 Q Oh. So you never asked him why it wasn't included.

10 A No, ma'am.

11 Q But you did -- You directed him to include it in his
12 report or make a supplement report?

13 A Yeah. I believe I asked him, "Hey, could you put that in
14 your -- you know, could you add that to a supplemental
15 report," yes.

16 Q So you're -- you're correct about that. You remember
17 that accurately.

18 A Yes.

19 Q Okay. And did he ever do that?

20 A To my knowledge, no, he did not.

21 Q Did you ever have occasion to call him back and say, "Can
22 I have that supplement report, please," or did you ever have a
23 chance to talk to him again to say, "Officer Kemp, why haven't
24 you done what I've asked you to do"?

25 A No, ma'am.

1 Q Is there a reason why you never circled back on him to
2 ask that question?

3 A We had -- We had -- We had conversations about him adding
4 that to the report. I just -- I never got the report --

5 Q Okay.

6 A -- with any addition.

7 Q And at some point Special Assistant U.S. Attorney Angel
8 Woodruff contacted you about this same thing; about, "Can we
9 obtain a supplemental report indicating the circumstances of
10 that statement," correct?

11 A Yes, ma'am.

12 Q Did you have occasion, after speaking with Ms. Woodruff,
13 to contact Officer Kemp again or that didn't happen?

14 A The conversations that I had with Officer Kemp would have
15 been probably right around that same timeline of when I talked
16 to Ms. Woodruff.

17 Q Okay. But still, you never received the supplemental
18 report.

19 A I did not.

20 Q Agent Eggers, you've been in law enforcement certainly
21 for a significant period of time, correct?

22 A Yes.

23 Q Can you tell me how many years?

24 A Sixteen years in the Air Force I was in law enforcement,
25 and I've been with Cape Girardeau Police Department for

1 four-and-a-half years.

2 Q So certainly you've written a lot of reports in your day
3 and understand that the reports have to be accurate and you're
4 not negligent in words that you use in your report, correct?

5 A Correct.

6 Q So if you could look at your report for me, and I would
7 like to look at Paragraph 3. And I'll actually open this up
8 so then everyone can see what we're looking at, including
9 Judge Crites-Leoni.

10 Let's see. What am I doing wrong here? Is it
11 showing up on everyone's ---

12 THE COURT: I think she's having to turn them on for
13 the monitors here.

14 MS. BOOTH: We have technical difficulty. I will
15 navigate around it.

16 THE COURT: Okay.

17 A Is this for the report dated 8-27?

18 Q (By Ms. Booth) I'm sorry, sir?

19 THE COURT: I wonder if it's not pointed -- Maybe it
20 needs to be ---

21 MS. BOOTH: Oh.

22 THE COURT: Okay. I have one monitor that does have
23 something but it looks like wood --

24 MS. BOOTH: Yeah, okay.

25 THE COURT: -- and I'm seeing the light.

1 MS. BOOTH: Yes.

2 THE COURT: Oh, and I'm seeing me now.

3 MS. BOOTH: Yes. I think that the error is on my end
4 and it's about to be corrected. There we go.

5 THE COURT: There we go, okay.

6 MS. BOOTH: Okay.

7 THE COURT: Oh, it just went away. There it is;
8 magic.

9 MS. BOOTH: All right. We're back.

10 THE COURT: Are you able to see it?

11 THE WITNESS: Yes, ma'am.

12 THE COURT: Okay. So Agent Eggers can see it as
13 well.

14 MS. BOOTH: All right.

15 Q (By Ms. Booth) So, Agent Eggers, you've brought your
16 report today. And, obviously, what I'm showing you on the
17 monitor, which I will mark as Defense Exhibit A, is a fair and
18 accurate representation of your report; correct?

19 A Yes, it is.

20 Q Okay. So let's go down to Paragraph 3, and we'll look at
21 this sentence here. "Kemp later attempted to conduct an
22 interview of Swan;" correct?

23 A Yes.

24 Q Okay. Can you tell me what information Officer Kemp gave
25 you that you would make that conclusion he was attempting to

1 conduct an interview of Swan?

2 A Officer Kemp told me that he tried to interview Mr. Swan.
3 Mr. Swan said that he didn't want to talk. And so as he was
4 walking him back, wherever -- wherever -- I guess I'm assuming
5 up in Florissant, is when he made the statement that he made.

6 Q Okay. So in going back to your memory, certainly you're
7 remembering everything accurately. We see this line in your
8 report, "Kemp later attempted to conduct an interview of
9 Swan," because that's what Officer Kemp told you.

10 A Correct.

11 Q "I" -- He said, "I attempted to conduct an interview of
12 Swan."

13 A Yes, ma'am.

14 Q Officer Kemp didn't say anything to you to the effect
15 that he just was talking about particulars during the booking
16 process and may take Barrett upstairs for interviewing, and
17 then Barrett just spontaneously uttered this statement,
18 anything like that.

19 A He didn't give me details. He just said he attempted an
20 interview.

21 Q Okay. Did you ever have occasion to ask Officer Kemp if
22 he ever gave Mr. Swan his *Miranda* rights prior to that
23 attempted interview?

24 A I don't remember if we discussed *Miranda*.

25 Q Okay. Were you concerned at all about that at that point

1 or you're just simply taking the information that Officer Kemp
2 was giving you?

3 A (Inaudible).

4 Q Okay. Agent Eggers, did Officer Kemp in any of the
5 subsequent conversations with you tell you that the passenger
6 of the car, Tiara Thorpe, told Officer Kemp at the scene,
7 "That gun is mine"?

8 A No, ma'am.

9 Q Did that ever come up?

10 A No.

11 Q Okay. And have you had an opportunity to do an eTrace on
12 this firearm?

13 A Yes, ma'am, I believe an eTrace was done, yes.

14 Q Okay. I don't have that paperwork. Do you know the
15 result of the eTrace? Can you tell us?

16 A I do not have that with me. I don't know.

17 Q That -- Do you know if the gun came back to Tiara Thorpe?
18 That it was purchased by her?

19 A I don't know.

20 Q Okay. But, of course, that's some information that you
21 can get for us.

22 A I can get that.

23 Q Okay. And if for some reason we can't find it, it's not
24 difficult to do an eTrace again.

25 A I don't know.

1 Q Okay. All right. All right. Just a moment, sir,
2 please.

3 (Pause)

4 MS. BOOTH: I have nothing further for Agent Eggers,
5 Your Honor.

6 THE COURT: Okay, very well. Cross Examination?

7 MR. SORRELL: No questions.

8 THE COURT: Okay. I just have a quick one.

9 EXAMINATION QUESTIONS BY THE COURT:

10 Q This JSOC, what does "JSOC" stand for?

11 A I'm not exactly certain.

12 Q Okay. But -- So the function of it, ---

13 A It's -- The function of that is when we enter warrants
14 into -- into our system, we get notified when those
15 individuals are picked up.

16 Q Okay. And so I guess that's exactly the point. So you
17 were the agent for Count 1 of the Indictment. And so the
18 reason Kemp contacted you is because your name somehow was
19 associated with the warrant as the agent to be notified when
20 an arrest was made?

21 A Yes, Your Honor.

22 Q Okay, very good.

23 THE COURT: That's all I have. Thank you. You're
24 excused.

25 Do you know what "JSOC" is?

1 MR. SORRELL: No, I didn't.

2 THE COURT: And I guess I would like just one
3 clarification maybe from counsel.

4 Between the pleadings and the facts stated and what
5 was relayed here, I understand there was a communication
6 between you and was it Special AUSA Woodruff about
7 supplementing the report?

8 MS. BOOTH: Yes, Your Honor.

9 THE COURT: Okay. And so there's no dispute
10 regarding that communication happening. And I guess Officer
11 Eggers was the person who made the communication with
12 Officer Kemp to see if he would prepare a supplemental report
13 at whatever date that was.

14 MS. BOOTH: Yes, Your Honor. I don't think that
15 there's a dispute between the Government and the Defense as to
16 whether Ms. Woodruff asked Agent Eggers, "Let's get a
17 supplement." I believe that that's accurate, but Mr. Sorrell
18 can address that. But I think that Agent Eggers even today
19 said that Ms. Woodruff had contacted him --

20 THE COURT: Okay.

21 MS. BOOTH: -- and asked him for a supplement report.

22 THE COURT: Okay.

23 MR. SORRELL: And I think that's -- that's accurate,
24 Judge, --

25 THE COURT: All right.

1 MR. SORRELL: -- although it didn't address any of
2 the suppression issues or the Fourth or Fifth or Sixth
3 Amendment issues. So I didn't --

4 THE COURT: Right.

5 MR. SORRELL: -- I didn't address it in my response.

6 THE COURT: Okay.

7 MR. SORRELL: So -- But I think that's accurate.

8 THE COURT: Okay. And so you identified Defendant's
9 Exhibit A, but it has not been offered.

10 MS. BOOTH: I just remembered that, Your Honor.

11 THE COURT: Okay.

12 MS. BOOTH: I'd like to offer Defendant's Exhibit A
13 into the record.

14 THE COURT: Any objection, Mr. Sorrell?

15 MR. SORRELL: No.

16 THE COURT: Okay. Defendant's A will be accepted
17 into evidence.

18 And there was no evidence from you. Is that right?

19 MR. SORRELL: No rebuttal.

20 THE COURT: You have rebuttal?

21 MR. SORRELL: No, I do not.

22 THE COURT: Okay. Okay. I mean -- I'm sorry --
23 there weren't any exhibits.

24 MR. SORRELL: Exhibits, yes.

25 THE COURT: I used the wrong word. Sorry about that.

1 Thank you. Yeah, you definitely presented some evidence,
2 didn't you?

3 MR. SORRELL: Yes.

4 THE COURT: You had witness testimony.

5 So with that, is there any further evidence,
6 Ms. Booth?

7 MS. BOOTH: No, Your Honor, there isn't.

8 THE COURT: Okay.

9 MR. SORRELL: Judge, I'll order a transcript --

10 THE COURT: Okay.

11 MR. SORRELL: -- as soon as we -- as soon as I get
12 back to the office. And I assume that Ms. Booth will want to
13 supply a brief. I don't know, but if she does, I'd like to
14 respond.

15 MS. BOOTH: I would like to do so.

16 THE COURT: Okay, very well. So once the transcript
17 is completed, how much time would you like, Ms. Booth, in
18 order to prepare your written post-hearing memorandum?

19 MS. BOOTH: Your Honor, two weeks will be sufficient.

20 THE COURT: Okay. And then for you, Mr. Sorrell?
21 Would you like an additional two weeks after that?

22 MR. SORRELL: Yes, Your Honor, please.

23 THE COURT: Okay. So two weeks for both sides is
24 fair.

25 And so what this means for you, Mr. Swan, is we're

1 still a distance away from getting an answer to your
2 questions, the issues that you've raised as to whether or not
3 your statement to Officer Kemp should be suppressed. And so
4 it's going to take a little bit of time for that transcript to
5 be prepared. Then Ms. Booth has two weeks to file her written
6 response, and Mr. Sorrell will have an additional two weeks.
7 So we're looking at over a month already. And then I have to
8 consider what everybody has argued.

9 THE DEFENDANT: Okay.

10 THE COURT: So it's going to be a little while.

11 THE DEFENDANT: What -- What exactly -- What do I
12 have to submit? What is being submitted?

13 THE COURT: So regular practice is for the lawyers,
14 after having heard the evidence and testimony of the
15 individuals who have knowledge of the underlying conduct that
16 you've challenged, for them to write about it and argue how
17 the law applies to those facts. So I'll want to hear both
18 sides, what their theories are; I mean for you and Ms. Booth,
19 why those statements should be suppressed.

20 THE DEFENDANT: Yes, ma'am.

21 THE COURT: And then Mr. Sorrell will have an
22 opportunity because we know he disagrees. He hasn't conceded.
23 He's conceded one part of the statement. He said that your
24 statement you're not going to talk, the Government has no
25 intention of offering that evidence at trial. So it's the --

1 the rest of your statement that the Government is interested
2 in presenting as evidence during the trial. So they will
3 defend why they believe it will be proper for that statement
4 to be admitted into evidence.

5 So I will wait and consider the arguments of both
6 sides before I actually make a decision and a recommendation
7 to your trial judge.

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: Does that make sense?

10 THE DEFENDANT: Yes, ma'am.

11 THE COURT: Okay. Do you have any other questions?

12 THE DEFENDANT: No, ma'am.

13 THE COURT: Anything further from either attorney?

14 MR. SORRELL: No, Your Honor. Thank you.

15 THE COURT: All right, very well. So, like I said,
16 it's going to take a little while. It's going to be at least
17 two months, probably somewhere around there, before you have
18 an answer to the question, but I know we'll all act as quickly
19 as we can. It just takes some time.

20 So for now, you will be remanded to the custody of
21 the Marshals, and Court is adjourned. Thank you, all.

22 MR. SORRELL: Thank you, Judge.

23 (Hearing adjourned at 11:10 AM.)
24
25

CERTIFICATE OF OFFICIAL REPORTER

I, Deborah A. Kriegshauser, Federal Official Realtime Court Reporter, in and for the United States District Court for the Eastern District of Missouri, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 17th day of January, 2019.

/s/ Deborah A. Kriegshauser

DEBORAH A. KRIEGSHAUSER, FAPR, RMR, CRR
FEDERAL OFFICIAL COURT REPORTER